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No. 82-2091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

SHEARN MOODY, JR.,
Petitioner,

v.

DAVID C. MEYERS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICI CURIAE OF THE STATE OF MISSOURI AND THE STATE OF OKLAHOMA

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BRIEF AMICI CURIAE OF THE STATE OF MISSOURI AND THE STATE OF OKLAHOMA

INTERESTS OF THE AMICI CURIAE STATE OF MISSOURI AND THE STATE OF OKLAHOMA

The States of Missouri and Oklahoma have a strong interest in the integrity of the federal system ordained by the United States Constitution, and particularly in preventing federal courts from substituting themselves for state lawmaking authorities in the exercise of lawmaking power outside the scope of the powers which have been delegated to the federal government by the Constitution, and which Congress has chosen to exercise. The States of Missouri and Oklahoma hope to persuade this Court to review and reverse the holding of the court below in order to reaffirm the constitutional limits on the powers of the federal judiciary and the constitutional integrity of the states as lawmaking bodies.

STATEMENT OF THE CASE

Amici hereby adopt by reference the Statement of the Case contained in the Petition for Writ of Certiorari at 2-6.

SUMMARY OF ARGUMENT

The concept of federalism embodied in the United States Constitution requires that the states retain not only titular authority to make decisions on matters not delegated to the central government, but also real power to enforce such decisions. Accordingly, when a federal court substitutes its own notions of sound policy for the applicable positive law that has been enacted by a state legislature or pronounced by a state court, the federal court does more than violate a "technical doctrine of procedure or jurisdiction." Rather, the unwarranted creation of "general federal common law" strikes at "the heart of the relations between the federal government and the states . . . ." C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 55 at 255 (3d ed. 1976); *see Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

In this case the Court of Appeals did not simply err in an attempt to apply state law. Rather, it made no attempt to determine what state law provided on the pivotal question in the case. The court brushed aside specific contentions about the statute and decisional law of Texas and Alabama with a single reference to an asserted general principle of law. This principle, however, had been repeatedly rejected by the state courts and state legislatures whose decisions the federal court was bound to apply.

The *only* remedy for the creation of general common law by a federal court in an area outside the authority of the federal government is review and reversal by this Court. In several recent decisions, this Court has reminded lower federal courts that not even the most broadly worded of federal statutes and constitutional provisions are to be construed so as to transform federal courts into courts of general common law. These admonitions will prove to be pointless if federal judges are free to reach whatever results they desire, without fear of Supreme Court review, simply by resorting to the rubric of "interpretation" of state rather than federal law. This

Court should therefore grant certiorari in this case in order to make it clear that *Erie* requires a sincere and thorough effort to discern and apply state law in pendent and diversity cases, even where the positive law of the state contravenes general principles in which the federal judge strongly believes.

I. The holding of the court below was clearly contrary to the applicable state law.

The Court of Appeals held that "there was *only one wrong complained of and proved:* the manipulation of the life interest leading to fatal undercapitalized acquisition." Pet. App. 27 (emphasis supplied). This "manipulation" was held to consist in the petitioner's requesting the Alabama Insurance Commissioner to revalue a life interest owned by the corporation, and his subsequent actions as an officer and director of the corporation in undertaking acquisitions "based on an artificial surplus created by the $14,403,200 revaluation of the life interest." Pet. App. 21. Petitioner contended in the proceeding below, however, that under the applicable law[1] the In-

[1] The Court of Appeals seems to have assumed that Texas substantive law applied to most issues in the case. Acknowledging that it was required to follow Texas conflict of laws principles, Opinion at 1458, the court did not in fact inquire into the conflict of law rule that Texas would have applied, but simply applied Texas law (except on the decisive issue in the case, where it neither cited any state law nor alluded to the absence of state authorities—see text at pages 2-5, *infra*). In fact, the opinion in *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979), suggests that a Texas state court would have applied Alabama substantive law. *Gutierrez* was decided while the appeal in this case was pending, but it should have been followed by the Court of Appeals. *See Vandenmark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941). The Court's failure to apply Alabama law would only be relevant if the substantive law of Texas was different from that of Alabama. In fact, had the Court of Appeals consulted *either* Texas or Alabama law on the question whether a state administrative decision can be collaterally attacked in a private suit for damages, it would have been forced to decide for petitioner rather than for respondents. *See* text as pages 2-5, *infra*.

surance Commissioner's ruling on the value of the life interest was not subject to collateral attack in an action for damages. If petitioner had prevailed on this point—*i.e.*, if the courts below had regarded themselves as *bound* by the administrative ruling that the life interest *was* worth $14 million—then petitioner could not have been held "grossly negligent" for acting in accordance with the Commissioners' finding and not with some other and perhaps better evaluation of what the life interest was worth.[2]

In rejecting petitioner's argument against collateral attack on the Commissioner's ruling, the Court of Appeals cited no authority and only the following analysis:

> This contention is spurious. An insurance company may not delegate responsibility for valuation of its assets to a state agency, and the mere fact that an insurance commissioner accepts a company's asset valuation does not immunize the company from liability arising from that valuation.

Pet. App. 22 n.11. This rule, on which the whole case turned, is directly contrary to the rule that would have been applied if the case had been tried in a state court.

The acts of the Alabama Insurance Commissioner are expressly made "quasi-judicial" by statute. Ala. Code § 27-2-31(a) (1975). The Commissioner's statutory duty

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[2] The court below also stated that the Commissioner "might" have been "swayed by considerations of friendship and obligation in approving the increased valuation of the life interest," Pet. App. 8 n.4, and that during an earlier proceeding than the one on which petitioner's liability was based, petitioner has "failed to disclose his belief that the trust interest was intended to be non-transferable." Pet. App. 26. Neither of these statements, however, was any part of the court's holding, since neither was found to have contributed to "the one wrong complained of and proved." Pet. App. 27. If the court below had regarded itself as bound by the Commissioner's finding that the life interest *was* worth $14 million, neither of these allegations could have created liability on the part of the petitioner, since all damage and all liability in the case were found to have resulted from the life interest being worth *less* than the Commissioner had found it to be worth.

includes a duty to make an independent appraisal of the value of the corporation's reserve assets. *Id.* § 27-2-21. This appraisal was made in writing after a hearing at which documentary and testimonial evidence was adduced. Pet. App. 7-8; DX 6. The statute provides an exclusive method for direct attack on rulings of the Commissioner, which must be brought in the circuit court of Montgomery County, Alabama. Ala. Code § 27-2-32 (1975). Similarly, in Texas (the forum state in the proceedings below, whose law the Court of Appeals applied on other questions and presumably would have applied to this question had it designed to apply state law at all), a direct attack on any "rule, regulation, order, decision or finding" of the State Board of Insurance is subject to review by suit filed in the state district court in Travis County, Texas, "and not elsewhere." Tex. Ins. Code Ann. art. 1.15, § 4 (Vernon 1981). Collateral attacks on agency determinations in private suits for damages are forbidden. *Railroad Commission v. McKnight*, 619 S.W.2d 255 (Tex. Civ. App. 1981); *Bolton v. Coats*, 514 S.W.2d 482 (Tex. Civ. App. 1974); *Railroad Commission v. Marathon Oil Co.*, 89 S.W.2d 517 (Tex. Civ. App. 1935); *Kirby Lumber Co. v. Adams*, 62 S.W.2d 366 (1933). *Accord, State v. Brooks*, 53 So. 2d 329 (Ala. 1951); *Huntsville v. Goodenrath*, 68 So. 676 (Ala. 1915). This rule flows from the quasi-judicial nature of administrative agency determinations and from the need for certainty in business transactions; it does not depend on the soundness of the business judgment, or even on the "good faith," of parties who have treated the administrative finding as though it were true rather than false. Thus, for example, an allegation that a defendant in an action for damages procured an administrative finding by making false statements to the tribunal was insufficient to allow the plaintiff to controvert the finding. *Bolton v. Coats, supra*, 514 S.W.2d at 487. These holdings are incompatible with the rule fashioned by the Court of Appeals in this case to the effect that a state may not "delegate" responsibility for evaluating its assets to a state agency, since

the sole effect of this "non-delegation doctrine" was to allow the evaluation to be controverted in a collateral action for damages.

II. The unconstitutionality of the court's decision to fashion a rule contrary to state law was not mitigated by the court's failure to announce its rejection of the state law.

Since *Erie Railroal Company v. Tompkins*, 304 U.S. 64 (1938), this Court has recognized that when a federal court substitutes rules of its own choosing for the statute or decisional law of a State whose sovereignty includes the power to make the law, the court violates the Constitution.

The decision of the court below to create "federal common law" rather than to follow the applicable state law was obfuscated by the court's failure to identify the source of the rule on which it resolved the case. While the court did not attempt to show that its "non-delegation" rule was derived from, or even consistent with, the law of Texas or Alabama, it also refrained from *announcing* that it was applying or creating federal common law. This does not change the nature of the decision. If the Court of Appeals had dealt thoroughly and candidly with the Texas and Alabama statutes and decisions, and then rejected them as "spurious" because they conflicted with a general overarching rule of law to the effect that companies may not "delegate" fact-finding responsibility to state agencies, there would have been no doubt of the court's violation of the Constitution as construed by the Court in *Erie*. Surely there can be no constitutional difference between a candid disavowal of applicable state authorities and a rejection *sub silentio* of the same authorities for the same purpose and to the same effect.

In a sense, federal courts create general federal common law whenever they make incorrect guesses about how state supreme courts would decide the questions of state law with which they are presented. *See, e.g., Vanden-*

mark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941). It would be neither possible nor desirable, however, for this Court to grant certiorari in order to consider every allegation that a federal court had simply *misconstrued* state law. What distinguishes this case—what makes it *at least* as destructive of the constitutional principle of federalism as a candid usurpation of state lawmaking power would have been—is that the court below made no *attempt* to apply state law to the question on which the case turned. If there had been no state statutes or decisions to be found, moreover, the court's failure to allude to its duty to apply state law would be no more than evidence of an unhealthy tendency to forget the role of the federal courts within the federal system; but in this case the court ignored state statutes and decisions that clearly contradicted its holding. Finally, in this case the way in which the court contrived to ignore state law—by rejecting a litigant's references to the enacted and decisional law of a state as "spurious" on the ground that they conflict with a general statement apparently derived from the court's apprehension of "the" law—is the very mode of judicial decisionmaking that *Erie* forbade.

When these three factors are present in a diversity or pendent jurisdiction[3] case—failure to cite state law or to allude to the absence of state authorities, a decision that clearly contravenes state law, and an apparent resolution of the state law question by reference to an asserted general principle of law—the decision partakes of all the evils that are characteristic of "federal general common law," whether or not the decision describes itself as a federal common law decision. Decisions such as the one rendered by the court below meet all the criteria by

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[3] The court below did not find it necessary to determine whether its authority to decide state law questions was based on diversity jurisdiction or on pendent jurisdiction. In either case a federal court's obligation is to follow the decisions of the state courts.

which impermissible federal common lawmaking is commonly characterized:

1) When different rules are applied in state and federal courts respectively—regardless of whether the federal courts admit they are applying different rules, and assuming only the "[p]ersistence of state courts in their own opinions on questions of common law," *Erie*, *supra*, 304 U.S. at 74—there will be a lack of uniformity in the law and a corresponding uncertainty surrounding commercial transactions.

2) Similarly, although diversity jurisdiction "was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State," application of different substantive rules in federal courts introduces "grave discrimination by non-citizens against citizens" by making "rights enjoyed under the unwritten 'general law' vary according to whether enforcement [is] sought in the state or federal court," and giving the power of selecting the forum (and hence the law) to the non-citizen. *Id.* at 74-75.

3) Whether an error results from a wilful rejection of the court's duty to apply state law or from a *sub silentio* rejection of state law in favor of an asserted general principle has no bearing on whether the error is "outcome-determinative." *See Guaranty Trust Company of New York v. York*, 326 U.S. 99 (1945). In this case the result reached by the courts below could not have been reached if the courts had followed the Texas and Alabama rule against collateral attacks on administrative rulings in private suits for damages, rather than the contradictory general principle formulated by the Courts of Appeals. See pages 2-5, *supra*.

4) Nor is this issue within one of the "narrow areas" in which the federal courts are "free to develop a common law" absent a delegation from Congress pursuant to a constitutional grant of federal power. These areas include

"those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (footnotes omitted). *See generally Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Illinois v. Milwaukee*, 406 U.S. 91 (1972); *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963). One danger flowing from an attitude among federal judges that they ought to formulate general principles of law to govern disputes between private parties outside these specialized areas is that the federal courts will then pay insufficient attention to the development of guidelines to determine when it *is* appropriate to apply or create federal common law. *See* Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). This danger is aggravated rather than alleviated when a federal court creates federal common law without acknowledging (and perhaps even without quite knowing) that it is doing so.

5) The outstanding characteristic of the general federal common law prior to *Erie* was the theoretical premise from which it proceeded: that there is "a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute." *Black and White Taxicab Company v. Brown and Yellow Taxicab Company*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). In *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842), for instance, the Court found it "necessary . . . to express our own opinion of the true result of the commercial law upon the question now before us," notwithstanding the New York decisions that had already addressed the question. *Id.* at 19. The more firmly the judges became convinced that the commercial law was an objectively ascertainable set of principles (like "a brooding ominpresence in the sky," *Southern Pacific Railroad Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J.)), however, the more

likely it became that the "general law" would amount to "little less than what the judge advancing the doctrine thinks at the time should be the general law." *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting). This theoretical premise and this style of decisionmaking were also the premise and the style of the court below. The Court of Appeals did not find it necessary to inquire into state law on the question because it felt *sure* that petitioner's argument was "spurious." Pet. App. 22 n.11. The argument was "spurious" because it conflicted with a general principle in which the court obviously believed quite strongly. *See id.* This approach to decisionmaking is precisely the approach taken in *Swift* and declared unconstitutional in *Erie*. The error of the court below was to base the petitioner's liability on a principle imported from a source other than (and, as it happens, hostile to) the statute and decisional law of Texas and Alabama. "But there is no such body of law. The fallacy and illusion . . . consist in supposing that there is this outside thing to be found." *Black and White Taxicab Co., supra*, 276 U.S. at 533 (Holmes, J., dissenting).[4]

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[4] Justice Story's belief that it was proper for federal judges to create general common law was closely related to his belief that the common law ought to embody the natural law. *See* J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 180-83 (1971). Conversely, Justice Holmes's distaste for the "brooding omnipresence" of federal common law was related to his rejection of the idea of natural law. *See id.* at ix-x. Limitations on the lawmaking authority of federal courts need not, however, be based on a rejection of the idea of natural law, since a belief in natural law does not entail the superior capacity or authority of federal judges as translators of natural law into positive law. Similarly, one who rejects the idea of objective right and wrong might logically choose to be a "federal judicial positivist" on the ground that he finds the rules generally made by federal judges more useful than, or otherwise preferable to, rules made by other lawgivers. For the purpose of constitutional analysis, it is enough to observe that judicial decisions *are* a kind of positive law, and that the Constitution reserves lawmaking power to state governments wherever such power has not been delegated to the federal government.

6) Application of any law other than that made by the state having the sovereign power to make the law injures not only one or more litigants, but also the state itself. "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 761 (1982). Therefore, "[n]othing can be more disturbing and irritating to the states than an attempted enforcement upon its people of a supposed unwritten law . . . to which they have never assented and which has no existence except in the brain of the Federal judges in their conceptions of what the law of the states should be on the subject considered. *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 403 (1893) (Field, J., dissenting). Indeed, "sophisticated students of government understand that these problems involve fundamental questions of power, and that the existence of democracy depends in no small part upon the proper allocation of such authority." Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L.J. 187, 187 (1957).

Although a candid refusal by a federal court to apply state law might be worse than a more casual approach such as that taken by the court below in that the former would add insult to injury, it is also possible that a bold usurpation is *less* dangerous than a quiet one in that it would be more likely to alert Congress to the need for remedial action. Concerning "fundamental questions of power" on which "the existence of democracy depends," some of the most dangerous errors in history have been made by those who proceeded quietly and with good intentions. Unless *mens rea* is to be introduced as a necessary element in establishing the unconstitutionality of federal lawmaking outside the delegated powers of the federal government, a federal court's negligent failure to apply applicable state law cannot be distinguished from a deliberate refusal to apply the same law under otherwise identical circumstances.

III. Without Supreme Court review and reversal of decisions creating general federal common law, other limitations on the federal judicial power will prove illusory.

Casual disregard of state authorities in the course of "interpreting" state law is one of several ways in which federal courts can exceed their constitutional authority to make law. Several recent decisions of this Court have had the effect of closing "loopholes" through which federal judges might have reached desired results at the expense of state sovereignty or the separation of powers. Unless the lower federal courts take seriously their responsibility to apply state law in diversity and pendent jurisdiction cases, however, other limitations on the federal judicial power will have no practical effect.

One way in which the federal courts have made law is by the "interpretation" of broadly-worded federal statutes so as to confer unlimited discretion on federal judges to make rules of law. In *Parrat v. Taylor*, 451 U.S. 527 (1981), this Court reversed a lower federal court's incorporation of the principles that "no loss should go without redress" into 42 U.S.C. § 1983. Significantly, the Court cited *Erie* and observed that there is "no general common law applicable to federal courts" as a basis for deciding cases on the basis of "a single general principle, however just that principle may be in the abstract." *Id.* at 531-32.

Similarly, where the United States has to some extent limited the decisionmaking authority of state governments by attaching conditions to federal grants, lower federal courts have sometimes seemed to regard these conditions as occasions for the wholesale extension into new areas of federal judicial power to define individual and governmental rights and responsibilities. This Court, however, has rejected such a construction. *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981). *See also Guardians Association v. Civil Service Commission of the*

City of New York, 51 U.S.L.W. 5105, 5109 (No. 81-431, decided July 1, 1983): "Since the private cause of action under Title VI [of the Civil Rights of 1964] is one implied by the judiciary rather than expressly created by Congress, we should . . . take care in defining the limits of this cause of action and the remedies available thereunder . . . ."

Even where state sovereignty is perhaps at its lowest ebb—where the Fourteenth Amendment to the Constitution requires the federal courts to review allegations that the state has deprived an individual of life, liberty, or property without due process of law—this Court has rejected attempts by lower federal courts to ignore the specific purposes of the Fourteenth Amendment and to construe it as "a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

Yet another way in which the federal courts might tend to become courts of general common law is by expanding the narrow scope of legitimate federal common lawmaking power. This Court has, however, recognized that it has a special responsibility to review such attempts at expansion. Indeed, "[s]ince the states are represented in Congress but not in the federal courts, the very concerns about displacing state law which counsel against finding pre-emption of *state* law in the absence of clear intent actually suggest a willingness to find congressional displacement of *federal* common law" by subsequent federal legislation. *Milwaukee v. Illinois*, 451 U.S. 304, 317 n.9 (1981).

In each of the types of cases discussed above, this Court reminded lower federal courts that the limitations on their lawmaking power are substantive as well as formal. It is not enough for a federal judge simply to make a ritual bow toward some source of authority—whether it be the Fourteenth Amendment, a federal statute, or the legitimate federal common law—and then to reach whatever result he desires in the case before him. When the

judge treats state law as little more than a base that must be touched prior to going about the business of judicial lawmaking, he achieves the same result as he would have done by using any of these devices the Court has so recently forbidden, and with even less constitutional justification.[5]

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[5] During the first few years after the decision in *Erie*, this Court reviewed a number of lower federal court decisions to determine whether they had correctly applied state law in diversity cases. Most of these were cases in which the lower federal courts had announced that they would follow some state authorities but not others. *See, e.g., West v. American Telephone and Telegraph Co.*, 311 U.S. 223 (1940) (federal courts must follow state intermediate appellate court decisions unless convinced that the state's highest court would decide otherwise); *Vandenmark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941) (federal Court of Appeals may not disregard state court decisions rendered after the date of the federal district court judgment being appealed). Two of the lower federal court decisions reviewed and reversed by this Court, however, were strikingly similar to the decision of the Court of Appeals in this case. In *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U.S. 188 (1939), and *Equitable Life Insurance Co. v. Halsey*, 312 U.S. 410 (1941), the courts of appeals had acknowledged their responsibility to apply state law but had in fact decided the principal issues without referring to applicable state court decisions. *See Arkansas Louisiana Gas Co. v. Texarkana*, 97 F.2d 5 (5th Cir. 1938); *Equitable Life Insurance Co. v. Halsey*, 112 F.2d 302 (1940). In the *Texarkana* case the Court of Appeals declared, "We think the appellant has the right of it throughout," because it was "perfectly plain" that a certain contract clause was "completely invalid and unenforceable as an attempt to abdicate and delegate" a legal duty. 97 F.2d at 9. The Supreme Court, however, granted certiorari "on account of asserted conflict with the decisions of the state courts," 306 U.S. at 191, and reversed. 306 U.S. at 201-02. Similarly, the Court of Appeals in the *Equitable Life* case declared, "We see no reason why appellant should be held accountable," since a certain clause in a contract "constituted a valid defense." The Supreme Court of Iowa, however, had concluded otherwise, and so the United States Supreme Court reversed. 312 U.S. at 423-26. The effect of this Court's decisions in *Texarkana* and *Equitable Life* was to remind the lower federal courts that they have an affirmative duty to *apply* state law, not merely to *say* they are applying it. The decision of the Court of Appeals in this case suggests that some federal judges need to be reminded again.

The decision of the court below, like the lower federal court decision that this Court reversed in *Parratt*, was a result of the same phenomenon that gave rise to *Swift v. Tyson:* excessive self-confidence on the part of some federal judges who feel they can provide "juster justice" than that which is embodied in the laws that state legislators and state judges have made. *Cf.* C. WRIGHT, *supra*, § 56 at 262. The "general commercial law" whose discovery was announced in *Swift* has been attributed to a desire on the part of certain federal judges "to establish a major procommercial legal doctrine that had consistently been opposed at the state level" and eventually "to take [commercial] disputes out of what might otherwise be an uncongenial anticommercial environment often found in state courts." M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 at 223, 252 (1977). *Erie* came at a time when this Court was reversing yet another wave of federal "judicial activism," in which judges had enforced their own social and economic philosophies under the pretext of finding the common law or interpreting the Constitution. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905). Recent decisions of this Court, such as *Parratt v. Taylor*, *supra*, are designed to curtail the latest resurgence of federal judicial activism—of which the decision of the court below is an outstanding example. Although the economic and social philosophy being imposed by some judges today, unlike the prevailing judicial philosophy during the *Swift* and *Lochner* eras, can hardly be called "procommercial," the threat to constitutional federalism and to government by the consent of the governed is identical.

This case is a perfect illustration of the point that this Court must police the frontiers of *all* doctrines limiting federal judicial lawmaking power in order for *any* of these limitations to be meaningful. If the court below had construed *federal* securities laws to impose personal liability on an insurance company officer for treating a cor-

porate asset as though it were worth what the state insurance commissioner said it was worth, the holding would have been quite controversial and would have merited review by this Court. If, on the other hand, a *state* court had been presented with the question of how the state law ought to be construed, it would have reached the opposite result. *See* pages 2-5, *supra*, and authorities cited therein. It would be ironic indeed if the decision below should escape review because it "merely" involves a *federal* court misconstruing *state* law. In which direction a lower federal court bows prior to creating federal common law—whether to the Fourteenth Amendment, to § 1983, to "the general commercial law," or to a "diversity jurisprudence" in which state statutes and state court opinions are overridden by axioms—makes no practical difference. None of these disguises should enable an unconstitutional exercise of federal judicial lawmaking to evade Supreme Court review.

CONCLUSION

For the reasons hereinabove stated, this Court should grant the petition for certiorari.

Respectfully submitted,

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